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No. 274.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

HERBERT H. MAASS, as Sole Surviving Executor of the Last Will and Testament of IDA H. SAKS, Deceased, *Petitioner*,

v.

JOSEPH T. HIGGINS, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONER.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The case was known below *sub nom. Saks* v. *Higgins*, the change in title in this Court being due to the death of one of the plaintiffs below.

The opinion of the district court (R. 17) is reported in 29 F. Supp. 996. The opinions of the circuit court of appeals (R. 31) are reported in 111 F. (2d) 78.

JURISDICTION.

The judgment of the circuit court of appeals was entered on April 24, 1940 (R. 39). The petition for a writ of certiorari was filed July 23, 1940, and was granted October 14, 1940 (R. 42). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether, when the executor elects, under Section 302(j) of the Revenue Act of 1926, as added by Section 202 of the Revenue Act of 1935, now Internal Revenue Code, Section 811(j), to have the property included in the gross estate on the date of the decedent's death valued as of the optional valuation dates, rather than at the date of death, there must be included in the valuation of the gross estate the income earned by such property between the date of death and the optional valuation dates, as provided in Article 11 of Treasury Regulations 80 (1937 ed.).

STATUTE AND REGULATION INVOLVED.

The Revenue Act of 1935, Sec. 202(a), amended Section 302 of the Revenue Act of 1926, (now known as Internal Revenue Code, Section 811), by adding a new subdivision, the pertinent portion of which is as follows:

> (j) Optional valuation. If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law[1]), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the exec-

[1] The executor is required to file the return within fifteen months from the date of death. Internal Revenue Code, § 821 (b); Reg. 80, Art. 63 (1937 ed.).

utor * * * or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. * * *

Treasury Regulations 80 (1937 ed.), Article 11, is set out in full in the Appendix, p. 44. The following significant portions may be quoted here:

> * * * the executor may * * * have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:
>
> (1) Any property distributed, sold, exchanged, or otherwise disposed of within one year after the decedent's death, valued as of the date of such distribution, sale, exchange, or other disposition, whichever first occurs;
>
> (2) Any property not distributed, sold, exchanged, or otherwise disposed of within such 1-year period, valued as of the date one year after the date of the decedent's death;
>
> * * * * * *
>
> The property to be valued as of one year after the date of decedent's death, or as of date of decedent's death, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. * * *
>
> [Interest]
>
> Interest-bearing obligations, such as bonds and notes, embody two promises, one to pay principal and the other to pay interest, and both promises are a part of the gross estate at the death of the decedent, if the obligation was then owned by him, or * * * at his death * * * was * * * within any of the other subdivisions of section 302 as amended. * * * If the valuation date is subsequent to death, the principal and interest then

accrued and unpaid are to be valued as of that date. The valuation date of any part payment of principal or of any installment of interest, made between decedent's death and the date as at which the obligation is to be valued, will be the date of such payment. Like rules will govern, so far as applicable, when any other obligation is involved, as, for example, one calling for the payment of rent or a royalty. Thus, in the case of rent, if the realty and the obligation to pay the rent reserved were parts of the gross estate at the time of decedent's death, the value of the former must be determined as of the applicable valuation date, and also the value of the rent then accrued and unpaid reserved by the latter. The valuation date of any rent paid in the interim pursuant to the rental obligation will be the date of its payment.

[Rents]

* * * * * *

[Dividends]

When corporate stock is a part of the gross estate at decedent's death, and a dividend in partial liquidation is thereafter paid on or before the date as of which the stock is to be valued, the valuation date of such dividend will be the date of its payment. Similarly, a dividend paid within the same period out of earnings, whether the earnings are made or accumulated prior or subsequent to decedent's death, will be valued as of the date of its payment. Earnings of the corporation neither declared as a dividend nor paid between decedent's death and the valuation date of the stock, will be reflected in the value of the stock. But a dividend declared prior to the valuation date of the stock and payable subsequent thereto will not be so reflected if the stock is selling "ex-dividend" on such valuation date, but is to be valued as of that date. * * * liquidating dividends and dividends paid from earnings are not pursuant to a promise but are referable to legal rights inherent in stock ownership.

STATEMENT.

The petitioner, with his co-executor since deceased, after claim for refund was denied, brought this suit in the District Court of the United States for the Southern District of New York against the collector to recover back an asserted overpayment of $3,952.45 in federal estate tax on the estate of Ida H. Saks (R. 4-7).

In substance, the complaint alleged (R. 4-7):

Ida H. Saks, the decedent, died on August 30, 1936 (R. 4). In filing the federal estate tax return on behalf of her estate, the executors elected to have the value of the gross estate determined by valuing the estate of the decedent as of the optional valuation date (R. 5).

Pursuant to the provisions of Treasury Regulations 80 (1937 ed.), Article 11, the Commissioner of Internal Revenue included in the amount of the gross estate the sum of $19,956.32, which was "not in fact property of the decedent belonging to her at the time of her death, but on the contrary represented income, to wit, rents, dividends and interest earned by and upon the property and assets of the estate subsequent to the date of death" of the decedent (R. 5, 12). The executors duly paid the tax thereafter assessed on this basis (R. 5-6). They filed a claim for refund which was rejected (R. 6, 8, 11).

The Collector answered (R. 13-14) raising no issue of material fact. Both parties brought on motions for judgment on the pleadings (R. 15, 16).

After hearing on the motions, the district court sustained the Collector's contention that the sum of $19,956.32, representing rents, dividends, and interest earned by the property and assets of the estate subsequent to the death of the decedent, was properly includible in valuing the gross estate and dismissed the complaint (R. 17-24, 25). The circuit court of appeals affirmed this judgment by a divided court (R. 31-38, 39).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the income earned by the estate subsequent to the death of the decedent should be included in the gross taxable estate under Section 302(j) of the Revenue Act of 1926, as added by Section 202(a) of the Revenue Act of 1935, and that Article 11 of Treasury Regulations 80 was in that regard valid.

2. In determining that the claim for refund herein was properly rejected and dismissing the complaint.

SUMMARY OF ARGUMENT.

Hereinafter, for purposes of simplicity, ordinary income earned by the estate of a decedent between the date of death and the optional valuation date, will be referred to as the "interim income". In the present case this "interim income" consisted, as said above, of rent, interest and dividends.

We respectfully assert that this interim income is not includable in valuing the gross estate of a decedent for estate tax purposes when the optional valuation date is used.

This conclusion is required

(a) By the ordinary and natural meaning of the language of the estate tax law, both what it says and what it does not say.

(b) By the history of Section 202 (a) of the Revenue Act of 1935, permitting the use of the optional valuation date, as it appears in the records of Congress.

(c) By the proper distinction between capital and income, as reflected in the estate tax law and the income tax law.

(d) By a critique of the argument which has been made for the inclusion of the interim income.

(e) By the specific evils—inequities and difficulties—to flow from requiring the inclusion of the interim income.

(f) By the applicable rules governing the construction of statutes and their interpretation through regulations.

We trust that what is said hereinafter may be read in conjunction with the opinions of the lower courts which have favored the construction for which we contend[2] and to which we assume the Court will advert, not because they have any authority here, but for their persuasive force.

ARGUMENT.

I.

THE OPTIONAL VALUATION STATUTE, SECTION 302(J), EFFECTED NO CHANGE IN THE BASIC PRINCIPLES OF THE ESTATE TAX LAW AND NEITHER EXPRESSLY NOR BY IMPLICATION REQUIRES THE INCLUSION OF THE INTERIM INCOME.

1. *Only the property which exists at death furnishes the measure of the tax.*—The estate tax, being levied upon the passing of the net estate from the decedent[3], has always

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[2] The dissenting opinion in *Saks* v. *Higgins*, 111 F. (2d) 78, 80 (C. C. A. 2). The opinion in *Clark* v. *United States*, 33 F. Supp. 216 (D. Md.). The dissenting opinion in *Estate of Abendroth* and *Estate of Blacque*, 41 B. T. A. 1178, 1179.

[3] The estate tax "is an excise imposed upon the transfer of or shifting in relationships to property at death." *United States Trust Co.* v. *Helvering*, 307 U. S. 57, 60. It "is a tax upon the transfer of his net estate by a decedent . . . It levies a sum equal to a certain percentage of the value of the net estate, and provides the criterion by which the net estate shall be ascertained." *Edwards* v. *Slocum*, 264 U. S. 61, 62-63. See also *Young Men's Christian Association* v. *Davis*, 264 U. S. 47, 50. *Chase National Bank* v. *United States*, 278 U. S. 327, 334. *Tyler* v. *United States*, 281 U. S. 497, 502. *United States* v. *Jacobs*, 306 U. S. 363, 367.

been measured, in the clearest terms, by the property existing at the date of death[4].

Prior to the Revenue Act of 1935 the property existing at the date of death was to be valued as at the date of death[5]. In the case of estates which suffered large shrinkages in value during the year subsequent to death, this gave rise to substantial hardship.[6] Congress undertook to relieve this hardship by Section 202 (a) of the Revenue Act of 1935, giving the executor the option to have the property valued *as of* the date one year after death. Great care was taken to make clear that the option related only to the *time* of valuation. The property to be valued remained the same, whichever date was selected. The basic provisions, now found in Internal Revenue Code, Section 811 (j) are as follows:

> (j) Optional valuation. If the executor so elects upon his return (if filed within the time prescribed by

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[4] Section 812 of the Internal Revenue Code provides that

> "For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States, by deducting from the value of the gross estate—" certain deductions.

Section 811 provides in part as follows:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—(a) Decedent's interest. To the extent of *the interest* therein of the decedent at the *time of his death;*" (italics ours)

There then follow further subsections, (b) to (i) inclusive, dealing with dower or curtesy interests, transfers in contemplation of or taking effect at death, revocable transfers, and other like matters, of which it may be at the moment sufficient to say that the words, "existing at the time of the decedent's death," appear in subsection (b), relating to dower or curtesy interests, and that other references to the date of death, as the time for the ascertainment of the taxable estate, occur repeatedly throughout. (The entire Section 811 appears in the Appendix, pp. 40-44)

[5] See note 4, *supra*.

[6] See Point II of this brief, p. 14.

law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing *all the property included therein on the date of the decedent's death* as of the date one year after the decedent's death, except that (1) *property included in the gross estate on the date of death* and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subsection (c), (d), or (f) of this section, distributed by the trustee under the instrument of transfer), or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. (Italics ours)

Of these provisions, three features are obvious:

(1) No stronger words, to exclude by implication future receipts in the nature of ordinary income, could have been selected than the clear and unambiguous statement that "all the property included therein *on the date of the decedent's death,*" may be valued "*as of*" the date one year later. (Italics ours)

(2) No express words, to include future receipts in the nature of ordinary income, are contained in this section, although the insertion of such words would have been the obvious and simple method of reaching that result, had Congress so desired. *United States* v. *Field,* 255 U. S. 257, 264.

(3) No words can be found in this section, requiring that any receipts subsequent to death be reflected in the valuation. Even in the case of "*property included in the gross estate on the date of death* and, within one year after the decedent's death * * * *sold, exchanged or otherwise disposed of,*" the price of the property is not included, but rather the property is "included at its *value* as of the time

of such * * * sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death." (Italics ours)

Notwithstanding the fundamental distinction between capital and income which is characteristic of the estate tax and income tax laws (see *Bull* v. *United States,* 295 U. S. 247, 256), Section 811 (j) makes no reference to including or valuing ordinary income received after death (as distinguished from increases in value of the capital asset, which are, of course, reflected in the optional valuation because that is the necessary effect of the express provisions).

2. *Ordinary income arises by severance and is not the substituted proceeds of the underlying property.*—Giving the words of Section 811 (j) their "plain popular meaning,"[7] they do not afford even a fragmentary ground for including, in the thing to be valued one year after the date of death, ordinary income derived since the date of death and having no separate existence at the date of death. To the general understanding, the distinction between the property and the income derived from the property is perfectly clear—between the tree and its fruit; between the mare and her colt; between the title to the land and the rent; between the share of stock and the dividend; between the debt and the interest. See *Helvering* v. *Horst,* U. S. Sup. Ct., decided November 25, 1940, 85 L. ed. 99.

When these items of income are received they do not, to the ordinary mind, stand in substitution for the underlying property. They arise by severance, take on an independent existence, and leave the underlying property intact.

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[7] *United States* v. *Kirby Lumber Co.,* 284 U. S. 1, 3. This Court has recently said that in the interpretation of tax statutes words should be "given their commonly accepted import. 'Congress may well be supposed to have used language in accordance with the common understanding.'" *United States* v. *Wurts,* 303 U. S. 414, 417. See also *Helvering* v. *San Joaquin Co.,* 297 U. S. 496, 499. *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 560. *Woolford Realty Co.* v. *Rose,* 286 U. S. 319, 329. *Avery* v. *Commissioner,* 292 U. S. 210, 214.

Naturally there is no difficulty about recognizing, as part of a man's estate at his death, those income items which by the date of death have acquired a separate existence by severance. But, at the other extreme, that the fruit not yet in bud, the colt not yet conceived, the rent for a period occupation of which has not yet been enjoyed, the dividends not yet declared, and the interest not yet earned—that these are in existence at the date of death and form part of a man's estate is a proposition far removed from the ordinary processes of thought and from economic realities.

Likewise, the ordinary mind has no difficulty in grasping that increases in the value of the underlying property, whether realized upon disposition or unrealized but reflected in present market value for the purposes of appraisal, are in and of the underlying property itself. To this, the express provisions of Section 811 (j) give full effect, thus rendering more emphatic the absence of any provision for the inclusion of the ordinary income.

The distinction is made even more sharp when we refer to the express provision that property "*included in the gross estate on the date of death*" and within the year "*sold, exchanged, or otherwise disposed of,*" shall be included at its value as of the time of such sale, exchange or other disposition. These are the only words of the section which deal with receipts subsequent to death. But it is a fantastic stretch of ordinary language to say that a sale, exchange or other disposition takes place when the fruit ripens and is picked, the colt is born, the rent is paid on the rental date in arrears, the dividend is declared and paid, or the interest is earned and paid.

3. *The Commissioner's regulation substitutes an attenuated subtlety for the obvious and rational meaning of the words of the statute.*—Article 11, of Regulations 80 purports to require the inclusion of such ordinary income items if the optional valuation is used. This regulation came, and remains, as a source of amazement to the Bar. It is

given in full in the Appendix, pp. 44-52, and is further criticised in connection with the opinion below, at pages 20-29 *et seq.* To justify the result just stated, the regulation, in a lengthy dissertation, undertakes to break up the general property existing at death into little parcels of rights[8] and to find, whenever income is realized pursuant to such a right, that such income stands in substitution for such right and hence constructively was part of the gross estate at the decedent's death.

The fallacy of this is apparent. The income does not stand, in any commonly accepted sense, as the *substituted* proceeds of any right which inhered in the general property. It is not like the collection of the debt, which is then paid, nor like the sale of the horse, which is then gone. On the contrary, the basic right inhering in the general property (to receive any and all crops, increase, rent, dividends declared, or interest as the payment for the use of money) is neither exhausted nor diminished as the increments which constitute income are severed and received. It exists as fully a year later as at the date of death.

Of course the income-producing potentialities of property affect its value at any particular time, and if the date for the realization of an installment of income is near at hand, this will have its specific effect. Thus, when the colt has been conceived, or the crop is ripening, or the dividend date is near, or the interest has been partly earned, the mare, land, stock or bond may sell for more.[9] But note that

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[8] A "dual nature," per Goddard, J., in *Saks* v. *Higgins*, 29 F. Supp. 996, 999 (S. D. N. Y.). And note that this is just the sort of barren refinement, out of the property law, which this Court has refused to apply, preferring to give to tax legislation a simple and realistic interpretation. *Helvering* v. *Hallock*, 309 U. S. 106.

[9] The inclusion of "accrued interest" as an item in the estate, is really but an example of this principle, merely conforming to the practice of the market in expressing in that way this current factor in the valuation of the bond. Obviously, there would be no accrual of interest upon a defaulted bond. On the other hand, the inclu-

at the option date, one year from death, a like factor of valuation will presumably exist, corresponding to the similar factor as it existed at the date of death. If it does, there is then no justice in drawing into the gross estate the income derived in the meantime. If it does not exist, this will in all likelihood have been because of just the sort of changed conditions against which the option was intended to relieve.

With respect to this regulation, one quotation from a decision of this Court is pertinent here, for it comes from the class of cases cited above, dealing with the attributing of ordinary meaning to words.

> As was said in *Lynch* v. *Alworth-Stephens* Co., 267 U. S. 364, 370, "the plain, obvious and rational meaning of a statute, is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover".
>
> *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560.

In the subsequent portions of this brief we shall endeavor to canvass all the possibilities of argument, but in the end, this case is very simple. It is this:—Would any ordinary man, when told that "all the property" present at a certain time is to be valued "as of" a later date, think that such value would include the income derived in the meantime from the property? We say "No." And this result would not be changed merely by pointing out to him something which he had already taken wholly for granted, namely, that the receipt of the income flows from rights inherent in the ownership of the property and from arrangements already made to develop its productivity.

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sion in the estate of a dividend having a record date before the date of death is an entirely different matter. Here the severance has actually occurred, even if payment has not been made, and there is a separate item.

II.

The Legislative History of the Statute Clearly Negatives the Existence of Any Congressional Intent to Require Inclusion of Interim Income in Valuing the Property to be Included in the Gross Estate.

We do not see how it can be said that the statute is ambiguous. The regulation purports to resolve an ambiguity, but it might be easier to say that it sets up the ambiguity as a man of straw. However, if it be assumed that the statute is ambiguous, its legislative history clearly negatives the view that Congress intended to exact the inclusion of the interim income as the price of the option to use the later valuation date.

The first proposal for relief made in connection with an increase in estate taxes, was for a "deduction", from the value at death, of the "net shrinkage in value" occurring during the first year after death. This proposal was explained as follows:

> The existing estate tax law is amended by a provision permitting the deduction of the shrinkage in value which may occur between the date of death and a date 1 year after death. * * * This provision is equitable in its effects and will prevent in practically all cases the danger of complete confiscation of estates due to a sudden decline in market values.[10]

A similar explanation was given on the floor of the Senate.[11] The amendment was adopted by the Senate on August 15, 1935, and described the deduction as:

> "The net shrinkage in value of assets arising solely from the difference in the aggregate value of assets forming part of the decedent's gross estate on the date of death and the aggregate value of *such assets* 1 year after the decedent's death * * *.'"[12] (Italics ours)

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[10] H. R. 8974, Sec. 202, as reported to the Senate; Sen. Report No. 1240, 74th Congress, 1st Session, p. 9.

[11] 79 Cong. Rec., pt. 12, pp. 13,043-13,044.

[12] 79 Cong. Rec., pt. 12, p. 13226.

Apparently the form of this proposal was not acceptable, for the report of the committee of conference substituted in place of it the present provision for an optional valuation.[13] The accompanying statement of the managers on the part of the House (printed with the report) explained that in lieu of the "deduction"—

> the conference action inserts a provision giving the executor an election *with respect to the time* as of which the property included in the gross estate is to be valued. Under existing law the valuation is made as of the date of death. If the executor exercises the election given him by the conference agreement, all the property included in the estate on the date of death is to be valued as of the date 1 year after the decedent's death, except that the value (at the time of distribution, sale, exchange, or other disposition) of property distributed, sold, exchanged, or otherwise disposed of, is taken in lieu of its value as of 1 year after death.[13] (Italics ours)

Immediately following the words last quoted, the House Managers gave a specimen computation showing "the operation of this new provision giving the executor an election". This example, by reason of its length, is set out in the Appendix, p. 52, and its present significance lies in the fact that in it the authors of the legislation placed on record their own illustration of the workings of the optional value, in which, notwithstanding that securities of a type normally income-bearing were assumed to exist, no item of interim income was included in the specimen net estate.

The specific indications of the Congressional intent to be drawn from this history may be summarized as follows:

1. The substitution of the optional valuation provision in place of a proposed "deduction" of the "net shrinkage in value" shows a positive trend away from a formula ("net shrinkage") in which the interim income could more easily have been reflected.

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[13] H. Rep't No. 1885, 74th Congress, 1st Session, pp. 4-5, 10-11.

2. The giving of the specimen computation, with no mention of items of interim income, shows that no such inclusion was actually intended, for such a qualification of the relief intended to be afforded was far too fundamental to have been merely overlooked, particularly since there was no express provision and inclusion could have arisen only by construction.

3. Even the proposal for the deduction of the "net shrinkage" was referable, as the above quotation shows, to the difference between the aggregate value of the assets which were in the estate at the date of death and the aggregate value of "such assets" one year later.

4. The express reference in the optional valuation provision to valuing "all the property included in the estate on the date of death" is even stronger than the previous reference to the valuation of "such assets".

Thus the legislative history of the statute not only gives no aid to the construction for which the Commissioner contends, but affirmatively shows, by every inference capable of being drawn, that that construction was not intended.

III.

The Commissioner's Regulation Violates the Concepts of Capital and Income Which Underlie the Federal Estate Tax and Income Tax Laws.

It is not our purpose here to embark upon a discussion of "double taxation," to contend that double taxation is unconstitutional or even that it is to be avoided. (See, however, *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189, 194-196; *Bull* v. *United States*, 295 U. S. 247, 255-257, and the discussion of this subject in the opinion in *Clark* v. *United States*, 33 F. Supp. 216, dealing with the present issue.) It is, however, true that in dealing with the estate tax law and the income tax law, which form part of a single system of taxation, the same concepts of capital and income should be maintained.

And, where dividends are concerned, it should be borne in mind that we are not now talking about the distinction between the capital and earnings of the corporation. We are speaking of the stockholder's capital and asking what is the property which the stockholder owns at his death.

The present issue is whether items of ordinary income, received after the date of death, are in any proper sense *a part* of *"the property included"* in the gross estate on the date of death. On this point, with respect to dividends at least, the decision in *Lynch* v. *Hornby*, 247 U. S. 339, should be conclusive.

In that case the questions were, first, whether under the Income Tax Act of October 3, 1913 a tax was laid upon corporate dividends, declared and paid in 1914, extraordinary in amount and to a large degree derived from surplus accumulated prior to March 1, 1913; and second, whether, if so construed, the Act would be constitutional as applied to the portion of the dividends derived from such previously accumulated surplus. The Court answered both questions in the affirmative, and in the course of doing so described the situation of the taxpayer as follows (p. 341):

> He was but one of many stockholders, and had but the ordinary stockholder's interest in the capital and surplus of the company; that is, a right to have them devoted to the proper business of the corporation and to receive from the current earnings or accumulated surplus such dividends as the directors, in their discretion, might declare. *Gibbons* v. *Mahon*, 136 U. S. 549, 557.

With respect to the power of Congress to tax the entire dividend as income, notwithstanding that part of it was derived from surplus accumulated before March 1, 1913, the Court said (247 U. S. 343-344, 346):

> And we deem it equally clear that Congress was at liberty under the Amendment to tax as income, without apportionment, everything that became income, in the

ordinary sense of the word, after the adoption of the Amendment, including dividends received in the ordinary course by a stockholder from a corporation, even though they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing. *Dividends are the appropriate fruit of stock ownership, are commonly reckoned as income, and are expended as such by the stockholder without regard to whether they are declared from the most recent earnings, or from a surplus accumulated from the earnings of the past, or are based upon the increased value of the property of the corporation.* The stockholder is, in the ordinary case, a different entity from the corporation, and Congress was at liberty to treat the dividends as coming to him ab extra, and as constituting a part of his income when they came to hand. (Italics ours)

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We do not overlook the fact that every dividend distribution diminishes by just so much the assets of the corporation, and in a theoretical sense reduces the intrinsic value of the stock. But, at the same time, it demonstrates the capacity of the corporation to pay dividends, holds out a promise of further dividends in the future, and quite probably increases the market value of the shares. In our opinion, Congress laid hold of dividends paid in the ordinary course as de facto income of the stockholder, without regard to the ultimate effect upon the corporation resulting from their payment.

The present case, as to dividends at least, is the exact converse of *Lynch* v. *Hornby*. The concepts of capital and income are correctly delimited in that case; and dividends should now be treated as received, not as the *substituted* proceeds of a right inhering in the stockholder's underlying property, but as the fruit, the offshoot which derives a separate existence by severance, leaving the right intact.

Although, by subsequent legislation, dividends out of earnings or profits accumulated before March 1, 1913 have been eliminated from taxable income, dividends are still taxed as income, notwithstanding that they are paid out of earnings accumulated prior to the beginning of the taxable year in which the dividend is paid. See, Internal Revenue Code, § 115 (a), (b). Thus the fundamental concept of *Lynch* v. *Hornby* remains unchanged and it is submitted that it should be carried out in the estate tax law, as in the income tax law, thus giving the words used by Congress their ordinary and natural meaning. It follows that a dividend due and paid after death is no part of "the property included" in the gross estate at death.[15]

Another case which illustrates the importance of maintaining a clear distinction between the concepts of capital and income, as reflected in the estate tax and income tax laws, is that of *Bull* v. *United States*, 295 U. S. 247. It was there held that the Government was not entitled to treat as a part of the gross estate profits received by the estate from a partnership in which the decedent had been a member under an agreement which gave the estate the right to a share of the partnership profits made during the year immediately following the decedent's death. The Commissioner claimed to be entitled to include these profits both in the gross estate for estate tax purposes and in the taxable income of the estate for income tax purposes. The profits were held correctly included in the taxable income, but incorrectly included in the gross estate.

The decision was based upon two grounds. First, that in the estate tax levy the identical money, which was made the subject of the income tax, was made the direct basis of

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[14] Cf. *Irwin* v. *Gavit*, 268 U. S. 161, 167-168.
Eisner v. *Macomber*, 252 U. S. 189, 206-207.
United States v. *Safety Car Heating Co.*, 297 U. S. 88, 99.

[15] See *Sharp* v. *Commissioner*, 91 F. (2d) 802 (C. C. A. 3) reversed on another point, 303 U. S. 624.

the tax, being treated as having the quality of capital or corpus and not being viewed merely as a measure of the valuation of a right passing from the decedent at death. Second, that there was no justification for characterizing the right of a living partner as his capital, and that if it was not capital to him it was not capital to his estate.

Without endeavoring to apply the decision in *Bull* v. *United States* by direct analogy to the present case, it furnishes strong assurance that the relationship between the estate tax law and the income tax law, in what is essentially a single system of taxation, calls for the enforcement of uniform and properly related concepts of capital and income.

IV.

Critique of the Opinion Below and of the Regulation.

Inasmuch as a critical discussion of the majority opinion below will directly tend to develop the arguments already advanced as well as those to be advanced hereinafter, it seems proper to take up such a discussion at this point.

We take it that, whatever else may be said of it, the opinion of the able and distinguished Judge who wrote the majority opinion for the Circuit Court of Appeals of the Second Circuit, found at 111 F. (2d) 78-80 (R. 31-38) may be deemed to embody as good an argument as can be made for the Government's case. With respect to this argument, the following comments may be made.

1. *The decision ignores relevant principles of construction.*—No recognition is given by the opinion to the rule for taking words of a tax statute in their plain popular meaning; to the rule of resolving all reasonable doubts in the taxpayer's favor; to the rule of giving to a remedial statute a liberal interpretation; to the limitations upon the power of the Commissioner to legislate through regulation, or to the limitations upon the right of the court to legislate through decision. No deference is paid to the fact that the words of

the statute, taken in their plain ordinary meaning, are fully capable of a simple interpretation, favorable to the taxpayer, which requires no refined analysis of property rights to sustain. Having made the assumption that the statute "is open to fair differences of construction", the only rule invoked for resolving those differences is that "an administrative interpretation is often highly persuasive" (111 F. (2d) 79, R. 33). The decision, therefore, leaps over and in no wise meets much of the argument which we present in this brief.

2. *The strained and artificial nature of the opinion is a confession of weakness.*—The structure of the opinion is almost a confession of weakness. Taking up first the case of the interest bearing bond, as providing (presumably because of the frequent use of detachable coupons) the one plausible illustration of a bundle of "separate obligations," and treating rent as analogous, the court proceeds to say that "for these reasons we think that as to all transactions of this kind it was permissible to read the word 'property,' in §202 (a) distributively; that is, as referring to an aggregate of obligations which changes with time." (idem p. 79, R. 33). Having done this, the court proceeds to admit that dividends might well fall in a different category (idem p. 79, R. 33), but decides that they should, nevertheless, be treated like the interest and the rents (idem, pp. 79-80, R. 33-34).

For this conclusion the court gives as its first reason that the stockholders are collectively the beneficial owners of earnings, as of the other corporate assets, and that unless the regulation is sustained some earnings, accumulated before the date of death, might, in the guise of dividends, slip out from beneath the estate tax (idem p. 80, R. 34). This argument, in addition to assuming that the ambiguity, if any, should not be resolved in the taxpayer's favor, contradicts the fundamental principles of *Lynch* v. *Hornby, supra.*

Next the court argues in favor of a uniform application of the statute (a uniformity led up to by its prior erroneous conclusions as to interest and rents) and proceeds on

this ground to include the dividends. The court admits that it is hard to see how all kinds of income could be reached, such as crops or offspring of livestock, but limits the need of uniformity to "income from investments" (111 F. (2d) 80, R. 34). This is a curious argument which says in substance that it is necessary to have uniformity but that, since there clearly cannot be uniformity as to *all* income, then there should be uniformity merely as to *certain kinds* of income, if for these kinds of income a common descriptive phrase can be found. How far afield this gets from any intent that can be deduced from the words of the statute!

Lastly, the court argues about the purpose of Congress and deduces, not the purpose indicated by the words of the statute when given their plain and ordinary meaning, but a purpose impliedly limiting the relief to be afforded. The option is said to be one between "accessible" and "inaccessible" values, of which "accessible values," income is to be treated as a part (idem p. 80, R. 35). This lifts itself by its own bootstrap. Congress said nothing about "accessible values." The statute merely refers to the values, as of one year from death, of the property *in the estate at death;* and if the interim income is, in a proper contemplation of the estate tax law, no part of that property, then it cannot be made a part simply by discovering that it is "accessible." It was "accessible" before, when only the value at the date of death was used, but no one claimed it was part of the property composing the gross estate at death.

The opinion says that,

> If they are not to be assessed upon what is practically beyond their reach, they should certainly be compelled to accept in its stead the total of what is practically within it. (idem p. 80, R. 35).

If the spirit of this language does not demonstrate a purpose on the part of the court to read its own views into the statute, regardless of whether they may be discoverable in the statute, it would be hard to find a judicial expression which does so.

3. *Even in dealing with interest and rent the opinion substitutes technicalities for actualities.*—Returning to the interest and rent, upon which cornerstone the whole artificial fabric of this opinion is built, we would point out that people do not commonly think of the coupon bond in terms of "a series of promises to pay installments of money in the future," part of which "we call interest" and the rest of which "we call principal" (idem p. 79, R. 32). Granting the complete assignability of the future installments of interest, there are still basically but two kinds of rights, the right to principal and the right to interest *thereon.* This Court has said that the holder of a coupon bond owns "*two* independent and separable *kinds of right* * * * Together they are an obligation to pay principal and interest * * *" (Italics ours). *Helvering* v. *Horst,* U. S. Sup. Ct., decided Nov. 25, 1940, 85 L. ed. 99, 100-101. The essence of the bond is the acknowledgment of the loan and the agreement to repay it with interest—"the right to demand and receive at maturity the principal amount of the bond representing capital investment . . . the right to demand and receive interim payments of interest on the investment in the amounts and on the dates specified by the coupons." (*Helvering* v. *Horst, supra*) This is very different from the lower court's view of the bond as embodying a great number of rights, all (whether called principal or interest) of essentially the same nature.

Having in mind the words of the circuit court of appeals, we examined coupon bonds issued by seven different corporations and found that in each instance the body of the bond contained the general promise to pay interest upon the surrender of the coupon and that each coupon recited a number of dollars, to be paid upon its surrender, "*being interest*" at the stated rate for a particular period. To say that these are "separate obligations" which "for convenience we group * * * together as a single piece of property, and they pass from hand to hand as such" (111 F. (2d) 79) wholly inverts the principle ~~for~~ or convenience. To the ordinary man, the provision made for the repayment of the loan

and for the compensation for use of the money are a single agreement, and it is "for convenience" that separate coupons are provided to the end that the corporation may pay each installment of interest when due without the necessity of obtaining proof as to the ownership at each interest date, of all of its bonds outstanding (See *Kenosha* v. *Lamson*, 9 Wall. 477, 482, 483-484). If the coupon bond is exchanged for a registered bond, doubtless this separability disappears (Cf. *Shaffer* v. *Federal Cement Co.*, 225 Fed. 893, 896-897).

The opinion uses this remarkable language, with respect to interest:

> and although to the lender the payments may appear to be the produce of his principal, it is not so; he gets it not because anything comes out of the money lent, but merely because a future dollar payable by another is less desirable than a present dollar in hand. (idem p. 79, R. 33.)

If this be anything, it is an argument that interest is not income. However, in the next sentence, the court says:

> His right to interest dates from the beginning. (idem p. 79, R. 33.)

Thus recognition is given, doubtless unintentionally, to the fact that the basic right to interest, *i. e.*, compensation for the use of money, is a continuing right and, as we have said, (p. 10, *supra*) the right itself remains unaffected as the payments are earned and are made.

In principle, the reasoning of the circuit court of appeals is opposed to the reasoning upon which this Court rested its decision in *Helvering* v. *Horst*, decided November 25, 1940, 85 L. ed. 99, where it was held that the assignor of a coupon remained taxable upon the interest as income, although the coupon was actually collected by the assignee. it was there said that—

> the import of the statute is that the fruit is not to be attributed to a different tree from that on which it grew. (85 L. ed. 99, 103.)

and that—

> to say that one who has made a gift thus derived from interest * * * paid to his donee has never enjoyed or realized the fruits of his investment * * * is to affront common understanding and to deny the facts of common experience. (85 L. ed. 99, 102.)

This should be sufficient to dispose of the present case adversely to the government, for it places the emphasis correctly upon the quality of the coupon as interest—the fruit growing upon the tree of the capital investment. In the present case the court below strained every effort to attribute to the interest a quality similar to that of the capital investment itself, and in so doing it erred.

With respect to rent, the opinion below states that—

> Since the series does not include any promise to pay principal, a lease is even more plainly a wasting piece of property. (111 F. (2d) 79, R. 33.)

Inasmuch as this assertion ignores the underlying property in the land, the right of the owner to have the land surrendered at the end of the lease, and the circumstance that the lease is merely a writing embodying the obligation to pay for the use of the land which rests in turn upon the land itself, we find it hard to say anything with respect to it except that it is a refinement upon a refinement, which does gross violence to the cardinal rules of statutory construction.

Both the opinion and the regulation follow the same pattern. Each takes the interest bearing bond first, because it affords the only plausible leverage for the argument. Having brought in the interest bearing bond by the use of concepts of property which are at least "unusual" (per Chase, J., dissenting)[16], each then proceeds to reach out and

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[16] The quotation, more at length, is as follows (*Saks v. Higgins*, 111 F. (2d) 78, 81 (R. 37)):

> "I do not suggest that such concepts of property are impossible but only that they are so unusual that they are too

drag in other kinds of income of types more and more difficult to bring within the scope even of the argument about the interest bearing bond. The opinion trails off to obscurity and the regulation is mute with respect to the case of the crops and the offspring of livestock. And yet this is all done in the name of uniformity and of sweet reasonableness.

4. *The treatment of the interest-bearing bond is contrary to the express language of the optional valuation statute.*— If, contrary to everything that we have said above, there be accepted the theory that the interest bearing bond can be veiewed as an aggregate of separate and distinct property rights which may be valued separately, the result of the decision is in direct contravention of the language of the statute itself, which provides (Internal Revenue Code, Sec. 811 (j)):

> Any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time.

A simple illustration will demonstrate this. Let it be assumed that at the date of death the decedent owned a coupon bond paying 4 per cent interest annually and having just under two years to run to maturity, hence bearing two

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much to load upon the language of this statute. To make them even approach the realm of practical economic reality in which taxation is to be kept * * * one would have to believe that it was both feasible and customary in a business sense to purchase and sell the so-called property consisting of the right to receive in the future unearned interest or income from intangibles as something separate and distinct from the ownership of the intangibles themselves. And, what is of even greater significance, it would also be necessary to believe that Congress meant to legislate on such a basis, rather than to say in simple words that, if the option offered was exercised, the estate income received by the executor during the year must be treated as though he had sold or otherwise disposed of property of a value equal to the amount of income received."

coupons. This bond is assumed to have a market value of $1000 at date of death. If we have here three pieces of property (the principal obligation and the two coupons) worth together $1000, the value of each piece must be something less. As the annual interest date falls just short of the date one year from death, then at the date of death the first coupon (discounted a own rate) is worth about $38.40, the second coupon is w th about $36.80, and the principal obligation of the bond is worth about $924.80. These sums add up to the $1,000.

A year later the first coupon has just been cashed for $40.00. Assuming that the market has not changed, the remaining coupon and the bond are then worth together $1,000, the remaining coupon being valued at about $38.40 and the principal obligation of the bond at $961.60. Thus, one year from the date of death, the three pieces of property (including the proceeds of the coupon just cashed) are worth $1,040. The only explanation of this increase in value is that one year has elapsed, reducing the extent to which the value of the pieces can properly be discounted.[17] Yet this is just the thing which the language quoted above has forbidden to be taken into account in making optional valuations.

It will be noted that the increase in value of the three pieces, due to the lapse of time, totals $40.00. The coupon collected just before the end of the year brought in $40.00. Thus the interim income and the increase of value in the three pieces, due to the lapse of time, are identical. Manifestly the short course of arriving at the correct result of the statute is to exclude the collected coupon from the valuation and simply take the market value of the bond at the date one year from death.

In the Commissioner's Regulation, a patent is given as one illustration of "properties, interests or estates which

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[17] Compare the language of the court below: "* * * merely because a future dollar payable by another is less desirable than a present dollar in hand. * * * an aggregate of obligations that change with time * * *" Per L. Hand, J. at 111 Fed. (2d) 79.

are affected by mere lapse of time" (see Appendix p. 48). In the assumed illustration, a patent, valued at $100,000 at the date of death, having been sold for $65,000 six months after the date of death, $5,000 is added back to the price to make "the adjusted value of the patent," on the ground that the patent, being assumed to have had ten years to run, lost 5 per cent of its value at the date of death during the six months between the date of death and the date of sale. Let us suppose that under this patent royalties were derived during the six months between the date of death and the date of sale. The Commissioner, with his point of view towards the interim income, would include these royalties in the taxable estate.[18] But is it not obvious that the royalties represent the benefit to the owner of the patent derived during this fraction of its expiring life, and that if the $5,000 is also included there will be a clear duplication—not "double taxation" but inclusion, in the base to which a single tax is to be applied, of the same property twice?

In the light of these illustrations, and doubtless others could be suggested, the case of the interest bearing bond, which is the fulcrum upon which all the leverage of the opinion of the Circuit Court of Appeals is brought to bear, exhibits a clear violation of the language of the statute. What then can be left of the claim that to secure uniformity other types of interim income should be drawn into the scope of an artificial generalization about "Investment" income?

5. *Finally, various inequities and difficulties necessarily flow from the attempted inclusion of the interim income.*— The mere existence of these inequities and practical difficulties furnishes the strongest evidence that such inclusion was not intended by Congress. The opinion does not advert to these in any way, and neither does the regulation. Apparently they were not even foreseen by the Commissioner.

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[18] See Regulation, Appendix, p. 46. And there would, on the Commissioner's construction, be no authority, at least in any express statutory provision, for deducting amortization of the patent. See further, as to this, pp. 30-31, *infra*.

They are so important that we discuss them under a separate heading directly below.

V.

Inequities and Difficulties Necessarily Flowing From the Attempt to Include the Interim Income Furnish Strong Evidence That Such Inclusion was Never Intended by Congress.

We do not, of course, contend that it would be beyond the power of Congress to provide expressly for the inclusion of the interim income, even though inequities and difficulties might result. But, resulting inequities and difficulties prove, for two reasons, that Congress never intended to bring about such inclusion by implication.

(a) It is inconsistent with the spirit of a statute intended to afford relief to accord to it a construction which gives rise to new hardships and to a multitude of problems not theretofore existing.

(b) When a construction of a law leads to inequities and to a multitude of problems of a nature which in tax legislation are customarily anticipated and provided for, and there appears in the statute nothing to indicate that such problems were even thought to exist, strong proof is given that the construction itself was never intended.

We will take up first practical problems and thereafter make mention of new inequities to which the proposed construction gives rise.

1. *The practical difficulties:*—

Since the whole claim for the inclusion of the interim income is based upon a refined construction given to general language, the statute, of course, gives no clue to the manner in which the supposed separate "right" is to be valued. With respect to this, the learned District Judge who decided *Clark* v. *United States*, 33 F. Supp. 216, said, at page 221-222:

There are additional considerations which make strongly against the interpretation of the statute put forward by the regulation. If it had been intended to include accruing income it seems highly probable that the statute would have expressly said so, as the thought is one that would very naturally have occurred to the draftsman of the language. And if this had been the thought it seems highly probable that some positive provision would have been made for the deduction from the gross income of expenditures to create it, which are a quite customary incident of property other than stocks and bonds and may even occur with them in exceptional cases. It could hardly have been the intention to include in the valuation gross as distinguished from net income, and the absence of any provision for deductions from gross income to establish net seems to be a strong indication that the statute did not intend to include income in the valuation.

Manifestly, gross income is not a proper measure of the value of the "right." Furthermore, if the "right" be valued by including the gross income, injustice is done, both absolutely, since only what is left after the expense of creating the income can possibly represent the value, and also relatively, since there would be discrimination between estates receiving their income from dividends and interest, which usually have slight expense of creation, and estates receiving rentals, the expense of creating which may be very large. Moreover, if it is not gross income that is to be included, no guide is afforded as to what deductions shall be allowed, and the law is left in much the same position as if the Federal income tax law merely mentioned a set of rates and directed that the same be applied to the taxpayer's "net income," without further definition or guidance.

Neither is there any guide as to what kinds of income may be included. The regulation, in providing for the inclusion of rents where there was a lease in force at the date of death, seems to imply that there might be no inclusion of rent flowing from a lease made by the executors. And yet, from the point of view of "accessibility" at least, one rent is as good as the other. A further problem might be thought to arise

in connection with the receipt of dividends proved to have been paid out of earnings of the corporation subsequent to the date of death.

In the regulation, the Commissioner departs as a practical matter from his refined theory of valuing the "right" and directs that in connection with each item of property there shall be separately included and valued, as of the date of payment, each item of income collected. Apparently, he views these items as includible in gross, for the regulation gives no recognition to, and makes no provision for, any factor of expense involved in creating or collecting the income, although in the case of real property, for example, such expenses may be extremely large, including local taxes, mortgage interest, management and brokerage fees, maintenance, repairs and other items.

As such items of expense are not deductible from the gross estate under any express provision of law, either as debts, expenses of administration or otherwise, the result is to measure the tax by an excessive value which is nowhere else compensated for. In taking this approach, the Commissioner seems to admit the unsoundness of his position, for he appears driven by the want of any standard in the law for ascertaining the *net* value of the supposed "rights", to adopt the manifestly unjust alternative of seizing upon the *gross* income as the basis of the tax.

The difficulties, moreover, are not limited to the ascertainment of what items of income are to be included, or to whether they shall come in gross or after some deductions; they extend even to the ascertainment of the existence of any income. In any case, for example, in which the decedent in his lifetime has made a transfer of property in contemplation of death or intended to take effect in possession or enjoyment at or after death, the regulation would seem to require the ascertainment, constructively if necessary, of the income to be attributed to that property during the year following the date of death. It is difficult enough, when the property may have been sold, converted or altered,

to bring the property itself down to the date of death, hypothetically, for the purposes of a current valuation. But when, on top of that, it becomes necessary to consider what income would have been received from such constructively present property, the inquiry seems far fetched indeed.

When there is considered the elaborate and detailed character of present day taxing statutes, and the pains taken in their drafting to anticipate problems and difficulties, it is utterly unreasonable to believe that Congress intended a construction of the optional valuation statute which burdens the relief with a multitude of new problems without providing in advance the slightest key to their solutions.

2. *Inequities:*—

The inequities inherent in the Commissioner's construction of the optional valuation provision are both absolute and relative.

As an example of the absolute sort, we would point out that the Commissioner's construction of the statute is bound to result in an unreasonable and disproportionate diminution of the relief. This is because there is no express provision in the statute which allows the income tax on the interim income to be a deduction from the gross estate when the optional valuation is used. Consequently, when the interim income is included in the gross estate in its entirety, without any deduction of the income tax levied upon that very income, a portion of the estate tax is levied upon monies which for all practical purposes are no part of the estate, in effect an estate tax upon the income tax. When this fact is combined with the higher rates of tax, it is quite possible to have the inclusion of the interim income result in combined estate and income taxes, solely due to this income, equal to or exceeding the income itself, and the same principle operates to some extent in every taxable estate, however small.

Relatively, as between life tenants and remaindermen, the effect may be materially to increase the burden which falls upon the remaindermen by levying the estate tax upon

income which enures to the life tenants. Also, as between residuary legatees under the will and beneficiaries of trusts or other conveyances made by the decedent in his lifetime, the effect is substantially to increase the burden upon those taking under the will although the income in question is not available to them, or even to the estate, for the payment of debts and expenses. As the Federal estate tax law makes no provision for apportionment except for the right of reimbursement from beneficiaries of life insurance, the tendency is to accentuate a hardship against which even the testator, by reason of the trust or conveyance being of long standing, may not have been able to relieve through any provision of his own. (See Karch, The Apportionment of Death Taxes, 54 Harv. L. Rev. 10, 22-28, 34-36).

We do not suggest that these illustrations are exhaustive. But they seem sufficient to demonstrate a clear incompatibility between the effects of the Commissioner's construction and the positive purpose of the statute to afford relief. And we would add at this point that if there is any particular occasion upon which it is inappropriate to attribute to Congress an intent to create or accentuate inequities, it is when positive purpose to afford relief is the single motivation of the law in question.

VI.

The Regulation Violates Every Applicable Rule Governing the Construction of Statutes and Their Interpretation Through Regulations.

All of the difficulties which we have just mentioned, whether of principle or of practical results, are avoided by adhering to elementary rules for the construction of statutes found in the decisions of this Court. We have already mentioned, Point I, *supra*, the rule for according to words their plain popular meaning. Other rules are as follows:

1. *For resolving doubts in the taxpayer's favor—*

"If doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer." *Hassett* v. *Welch*, 303 U. S. 303, 314.[19] This proposition is deeply imbedded in the decisions of this Court, where in varying language it is found stated with great vigor. No suggestion has ever been offered that it should be overruled. It can be applied to the present issue without hesitation, for here all taxpayers are similarly situated. (Cf. *Burnet* v. *Guggenheim*, 288 U. S. 280, 286)

2. *For construing remedial legislation liberally—*

In a broad sense, Section 202(a) of the Revenue Act of 1935 was remedial legislation. It was intended to relieve against the unfair result of shrinkages in estates. "Manifestly it is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide." *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 263. *Burnet* v. *Marston*, 57 F. (2d) 611, 612 (App. D. C.).

It is obvious that the result of the Commissioner's regulation is to restrict the relief given. It is equally obvious that the regulation is founded in the Treasury's desire that the relief should be held to the narrowest scope for which any argument can be made. The character of the regulation demonstrates this upon its face. It is inconsistent both with the general rule of construction in favor of the taxpayer and also the somewhat more specialized and reenforced rule to which we have just adverted.

The privilege granted to the taxpayer by the statute is not an "exemption." It does not favor one taxpayer over another. It does not accord special treatment to any. On the contrary, it is an option, equally available to all, and implying freedom and equality of choice in either branch of

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[19] See also *Gould* v. *Gould*, 245 U. S. 151, 153. *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602, 606. *United States* v. *Merriam*, 263 U. S. 179, 187-188. *Crooks* v. *Harrelson*, 282 U .S. 55, 61. *White* v. *Aronson*, 302 U. S. 16, 20.

the option. There is, therefore, no excuse for a strained construction cutting down the relief.

3. *For limiting the weight accorded departmental regulations—*

While it is said that "great weight is attached to the construction consistently given to a statute by the executive department charged with its administration,"[20] it is also true that "administrative practice and treasury rulings * * * cannot narrow the scope of a statute when Congress plainly has intended otherwise." *Neuberger* v. *Commissioner*, U. S. Sup. Ct., decided Nov. 12, 1940, 85 L. ed. 16, 19.

This is because the power "to prescribe rules and regulations * * * is not the power to make law * * * but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Co.* v. *Commissioner*, 297 U. S. 129, 134.[21]

Also, while re-enactment of a statute, without substantial change, subsequent to the promulgation of Treasury regulations, may import a legislative approval of such regulations, *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299, 302-303, it remains true that "where the law is plain the subsequent re-enactment of a statute does not constitute adoption of its administrative construction." *Biddle* v. *Commissioner*, 302 U. S. 573, 582.

True, these decisions of this Court do not afford rules of thumb for mechanical application; they need to be applied with discrimination to the circumstances of each particular case.

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[20] *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.

[21] See also *Koshland* v. *Helvering*, 298 U. S. 441, 446-7 ("no power to amend . . . by regulation". id. 447); *Walker* v. *United States*, 83 F. (2d) 103, 106 (C. C. A. 8); *Commissioner of Internal Revenue* v. *Winslow*, 113 F. (2d) 418, 423 (C. C. A. 1).

In the present case these are the circumstances: (1) the statute is plain and unambiguous, and the regulation is not in harmony with it; further, assuming any ambiguity, (2) there has been no significant re-enactment by Congress since the promulgation of the regulation, and (3) the regulation itself has not stood unquestioned for any such length of time as to permit it to have substantial weight.

The Revenue Act of 1935 was enacted August 30, 1935. The only re-enactment of the optional valuation section has been in the Internal Revenue Code, which is, of course, but a codification and not a new declaration of legislative policy. It is entitled "An Act to Consolidate and Codify the Internal Revenue Laws of the United States" and it is expressly stated in Section 4 (a) that the Internal Revenue Title is "intended to include all general laws of the United States and parts of such laws, relating exclusively to internal revenue, in force on the 2d day of January 1939, (1) of a permanent nature, and (2) of a temporary nature if embraced in said Internal Revenue Title." Act of February 10, 1939, c. 2, 53 Stat. 1. It is manifest that such a re-enactment is not in itself an approval of an administrative regulation. See *Helvering* v. *Hallock*, 309 U. S. 106, 120, note 7.

After the enactment of the statute in August 1935, something over a year went by before the new regulation was promulgated on September 25, 1936. XV-2 Cum. Bull. 293. The regulation was denounced by competent commentators,[22] and it has been, so to speak, on trial from the begin-

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[22] The following are mentioned in the decision of *Clark* v. *United States*, 33 F. Supp. 216, at p. 223:

18 Chicago-Kent Law Rev., March 1940, pp. 150, 163; Montgomery, Federal Taxes on Estates, Trusts and Gifts (1938-9 Ed.) p. 230; Hughes Federal Death Taxes (1938 Ed.) p. 310 note; Penna. Bar Ass'n. Quarterly, No. 34, pp. 100, 105; The Magazine "Taxes", March 1939, p. 147.

And in observing these dates it should be recalled that the comments were doubtless written some time before the publication. See also (1940) 40 Col. L. Rev. 1091-1094.

ning. It has not been "generally unchallenged" (*Cf. Norweigian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315).

When it is borne in mind that estate tax returns are filed fifteen months after the date of death and that thereafter substantial time is required for audit, for the presentation of the taxpayer's arguments to the Bureau of Internal Revenue, for the filing, prosecuting and disposing of claims for refund, and for the commencement of court proceedings and the bringing of the same to trial, it is manifest that the present case, which was decided in the United States district court for the southern district of New York on October 27, 1939 (29 F. Supp. 996), has come forward as promptly as might reasonably have been expected for any test of the regulation's validity. Other taxpayers have prosecuted like claims[23] and it is but fair that the regulation should have no greater weight accorded to it today than it was entitled to the day after its promulgation.

Lapse of time required to bring the taxpayer's case to this court's attention, cannot properly be used to impart added weight to the Government's position; and upon the showing which has been made of steady and consistent opposition to this regulation since its pronouncement, the taxpayers of the country are entitled to exactly the same open consideration, regardless of lapse of time, as was

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[23] *Estate of Abendroth* v. *Commissioner*, 114 F. 2d 1017 (C. C. A. 2) cert. granted Nov. 11, 1940, Nos. 510-511; *Clark* v. *United States*, 33 F. Supp. 216 (D. Md.); *Gude, et al., Executors* v. *Commissioner*, BTA Docket No. 97139, Memo Opinion, June 15, 1940, *Estate of Spurr* v. *Commissioner*, BTA Docket No. 99391, Memo Opinion, May 18, 1940, both now pending upon petition for review in the Circuit Court of Appeals for the Fourth Circuit; *Estate of Eaton* v. *Commissioner*, BTA Docket No. 97351, Memo Opinion, May 20, 1940, now pending in the Circuit Court of Appeals for the First Circuit; *Estate of Singer* v. *Commissioner*, BTA Docket No. 97811, Memo Opinion, June 5, 1940, now pending in the Circuit Court of Appeals for the Third Circuit; *Estate of Mayer* v. *Commissioner*, BTA Docket No. 97590, Memo Opinion, July 13, 1940.

accorded to the government in *Higgins* v. *Smith*, 308 U. S. 473. We submit that there has been "no conjunction of long, uniform administrative construction and subsequent re-enactment of an ambiguous statute" (*Helvering* v. *Hallock*, 309 U. S. 106, 120 note 7) and that the regulation is in essence a partisan argument and should be so regarded in considering the proper construction of the statute.

4. *For avoiding the usurpation of legislative functions under the guise of construction.*

Under ordinary canons of construction, as shown above, the language of the statute under discussion does not call for the inclusion of the interim income in the gross estate. Language could easily have been used which would have done so. There is nothing to indicate that the failure to do so was an oversight on the part of Congress.

The Commissioner apparently conceives that the legislation was defective for want of such a provision. But any arguments to the court along that line must, by their very nature, be founded upon considerations essentially of a legislative nature, and they should, for that very reason, be rejected. It is firmly established that the courts should be scrupulous not to usurp the legislative function under the guise of statutory construction.[24]

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[24] "In the Act of 1913, it would have been easy to require a trustee to pay an income tax on income received by him for unborn beneficiaries or for the trust or the estate. But Congress did not do so. In the next act, it did so. We cannot supply the omission in the earlier act." *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602, 607.

"Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circum-

The current trend in the decisions of this Court emphasizes the impropriety of substituting judicial for legislative judgment as to the wisdom of legislation. See, *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 399; *Helvering* v. *Davis*, 301 U. S. 619, 644. There is even less excuse for injecting judicial views of legislative policy into the construction of a remedial statute, and so amending it under the guise of interpretation, than for being critical of the policy of a statute when it is challenged as conflicting with the supreme law of the land.

CONCLUSION.

It is respectfully submitted that judgment should be reversed, and the cause be remanded to the circuit court of appeals with directions to reverse the judgment of the district court and to enter judgment for the petitioner.

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December 1940.

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spection in order to avoid usurpation of the latter." *Crooks* v. *Harrelson*, 282 U. S. 55, 60.

"This language adopted by Congress clearly and unambiguously indicates the purpose to tax the entire value of a joint tenancy under circumstances shown by this record. We are without authority to add language to the statute directly contrary to such a clearly expressed purpose." *United States* v. *Jacobs*, 306 U. S. 363, 373.

APPENDIX.

Internal Revenue Code, §811 (derived from Revenue Act of 1926, §302, as amended):

"§ 811. GROSS ESTATE

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) DECEDENT'S INTEREST. To the extent of the interest therein of the decedent at the time of his death;

(b) DOWER OR CURTESY INTERESTS. To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

(c) TRANSFERS IN CONTEMPLATION OF, OR TAKING EFFECT AT DEATH. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

(d) REVOCABLE TRANSFERS

(1) TRANSFERS AFTER JUNE 22, 1936. To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate

and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) TRANSFERS ON OR PRIOR TO JUNE 22, 1936. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he had made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

(3) DATE OF EXISTENCE OF POWER. For the purposes of this subsection the power to alter, amend, or revoke, shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

(4) RELINQUISHMENT OF POWER IN CONTEMPLATION OF DEATH. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests

(whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter.

(e) JOINT INTERESTS. To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

(f) PROPERTY PASSING UNDER GENERAL POWER OF APPOINTMENT. To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, or (3) by deed under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the

persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth; and

(g) PROCEEDS OF LIFE INSURANCE. To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

(h) PRIOR INTERESTS. Except as otherwise specifically provided therein, subsections (b), (c), (d), (e), (f), and (g) shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after February 26, 1926.

(i) TRANSFERS FOR INSUFFICIENT CONSIDERATION. If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subsections (c), (d), and (f) is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

(j) OPTIONAL VALUATION. If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subsections (c), (d), or (f) of this section, distributed by the trustee under the instrument of transfer), or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition,

whichever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. No deduction under this subchapter of any item shall be allowed if allowance for such item is in effect given by the valuation under this subsection. Wherever in any other subsection or section of this chapter, reference is made to the value of property at the time of the decedent's death, such reference shall be deemed to refer to the value of such property used in determining the value of the gross estate. In case of an election made by the executor under this subsection, then for the purposes of the deduction under section 812 (d) or section 861 (a) (3), any bequest, legacy, devise, or transfer enumerated therein shall be valued as of the date of decedent's death with adjustment for any difference in value (not due to mere lapse of time or the occurrence or non-occurrence of a contingency) of the property as of the date one year after the decedent's death (substituting the date of sale or exchange in the case of property sold or exchanged during such one-year period."

Treasury Regulations 80, (1937 ed.):

"Art. 11. **Optional valuation date.**—In general, the object of subdivision (j) of section 302 is to make provision whereby the amount of tax otherwise payable may be lessened when, within the year following the decedent's death, the gross estate has suffered a shrinkage in its aggregate value.

If the decedent died after August 30, 1935, the executor may, by an election upon his return, Form 706, if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law, have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:

(1) Any property distributed, sold, exchanged, or otherwise disposed of within one year after the decedent's death, valued as of the date of such distribution, sale, exchange, or other disposition, whichever first occurs;

(2) Any property not distributed, sold, exchanged, or otherwise disposed of within such one-year period, valued as of the date one year after the date of the decedent's death;

(3) Any property, interest, or estate which is affected by mere lapse of time, valued as of the date of decedent's death; except that an adjustment is to be made for any difference in its value, not due to such lapse of time, as of the date one year after the date of decedent's death, or as of the date of its distribution, sale, exchange, or other disposition, whichever date first occurs.

Property "distributed" is limited to distributions thereof by the executor, or by the trustee in the case of property included in the gross estate under subdivision (c), (d), or (f) of section 302, as amended. Distribution may be effected by the entry of the order or decree of distribution, or, if there is no such order or decree, by the segregation or separation of the property from the estate or the trust, or by the actual paying over or delivery of the property to the person entitled thereto by the will, or under the law, or by the terms of the trust.

The sale, exchange, or other disposition, to which subdivision (j) refers, may be one made by the executor, or by the trustee of property included in the gross estate under subdivision (c), (d), or (f) of section 302, as amended, or by any other person to whom the property had not been distributed by the executor or by such a trustee, or to whom it had not passed from the gross estate as the result of a sale, exchange, or other disposition thereof, as, for example, a sale, exchange, or other disposition by an heir, devisee, donee or grantee to whom the decedent in his lifetime transferred the property, or by the survivor of the decedent if the property had been held by them subject to the right of survivorship.

Property, in the case of a sale, exchange, or other disposition thereof within the one-year period, is to be valued as of the date when it ceases to form a part of the gross estate, that is, the date when the title passes as the result of its sale, exchange, or other disposition. The terms, "distributed," "sold," "exchanged," "or otherwise disposed of" comprehend all possible ways by which property may be separated or passed from the gross estate. Thus, money

on hand at decedent's death which is thereafter used in the payment of the funeral expenses, or in settlement of claims against the estate, or is invested, falls within the term "otherwise disposed of."

The property to be valued as of one year after the date of decedent's death, or as of date of decedent's death, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. As property and its value are separate and distinct, the former denoting legal rights, the latter the monetary measure of such rights, and as subdivision (j) treats of the two separately, it will be necessary in every case first to determine what property constituted the gross estate at decedent's death. Subdivisions of section 302, as amended *other* than subdivision (j), supply the information necessary to that determination, subdivision (j) being, in the main, confined to the date or dates as at which the value is to be ascertained.

Interest-bearing obligations, such as bonds and notes, embody two promises, one to pay principal and the other to pay interest, and both promises are a part of the gross estate at the death of the decedent, if the obligation was then owned by him, or had been previously so transferred by him, or at his death there was vested in him any such right or power in or with respect to the obligation as to bring it within any of the other subdivisions of section 302, as amended. If the valuation date is that of decedent's death, the principal of the obligation and interest then accrued and unpaid thereon are to be valued as of that date. If the valuation date is subsequent to death, the principal and interest then accrued and unpaid are to be valued as of that date. The valuation date of any part payment of principal or of any installment of interest, made between decedent's death and the date as at which the obligation is to be valued, will be the date of such payment. Like rules will govern, so far as applicable, when any other obligation is involved, as, for example, one calling for the payment of rent or a royalty. Thus, in the case of rent, if the realty and the obligation to pay the rent reserved were parts of the gross estate at the time of decedent's death, the value of the former must be determined as of the applicable valuation date, and also the value of the rent then accrued and unpaid reserved by the latter. The valuation date of any

rent paid in the interim pursuant to the rental obligation will be the date of its payment.

As in the case of bonds and notes, the interest accrued and unpaid upon a judgment on the date as of which the judgment is to be valued is to be included in the valuation. The valuation date of any part payment of the judgment, or of any interest thereon (without regard to whether earned before or after decedent's death), made between decedent's death and the date as of which the judgment is to be valued, will be the date of such payment.

When corporate stock is a part of the gross estate at decedent's death, and a dividend in partial liquidation is thereafter paid on or before the date as of which the stock is to be valued, the valuation date of such dividend will be the date of its payment. Similarly, a dividend paid within the same period out of earnings, whether *the earnings are* made or accumulated prior or subsequent to decedent's death, will be valued as of the date of its payment. Earnings of the corporation neither declared as a dividend nor paid between decedent's death and the valuation date of the stock, will be reflected in the value of the stock. But a dividend declared prior to the valuation date of the stock and payable subsequent thereto will not be so reflected if the stock is selling "ex dividend" on such valuation date, but is to be valued as of that date.

Differing from payments of principal and interest in the case of bonds and notes, those made upon a judgment are not pursuant to a promise but to an obligation imposed by law, which obligation, in its totality, is a part of the gross estate at decedent's death if coming within any of the other subdivisions of section 302, as amended. So, too, liquidating dividends and dividends paid from earnings are not pursuant to a promise but are referable to legal rights inherent in stock ownership.

By way of illustrating the operation of subivision (j), there is given the following example in which the death of the decedent will be taken to have occurred December 1, 1935:

Description	Valuation Date	Value at Valuation Date	Value at Date of Death
Improved real estate — not disposed of within year following decedent's death	Dec. 1, 1936	$30,000	$35,000
Rents accrued but unpaid under lease antedating decedent's death	Dec. 1, 1936	900	500
Rent paid Jan. 1, 1936	Jan. 1, 1936	600	....
Bonds sold June 1, 1936	June 1, 1936	59,400	60,000
Interest accrued and unpaid thereon	June 1, 1936	400	400
Interest paid Apr. 1, 1936	Apr. 1, 1936	1,200	....
Corporate stock — distributed to legatee Nov. 1, 1936	Nov. 1, 1936	100,000	200,000
Cash dividend paid upon such stock Aug. 1, 1936	Aug. 1, 1936	100,000	....
Bonds matured and paid Oct. 1, 1936	Oct. 1, 1936	12,000	12,000
Interest accrued	....	....	80
Interest paid at maturity	Oct. 1, 1936	240	....
Interest paid Apr. 1, 1936	Apr. 1, 1936	240	....
Corporate stock — not disposed of within year following decedent's death, and upon which no dividend was paid in that period	Dec. 1, 1936	50,000	100,000
Total value of gross estate pursuant to the election		354,980	
Total value of gross estate as of date of decedent's death			407,980

Properties, interests, or estates which are affected by mere lapse of time include patents, estates for the life of *a person* other than the decedent, remainders, reversions, and other like properties, interests, or estates. The phrase "affected by mere lapse of time" has no reference to obligations for the payment of money, whether or not inter-

est-bearing, the value of which changes with the passing of time. However, such an obligation, like any other property, may become affected by lapse of time when made the subject of a bequest or transfer which itself is creative of an interest or estate so affected.

The date of valuation of any property, interest, or estate so affected is, as prescribed in subdivision (j), the date of decedent's death, but with an adjustment to be made of the value then obtaining, which adjustment, while disregarding any later increase or decrease in value due solely to lapse of time, adds to or substracts from the value at death any difference between that value and the value as of the date one year after decedent's death, or the applicable intermediate date, if, and to the extent that, such difference was due to a cause or causes other than lapse of time. Accordingly, in the valuation of any property, interest, or estate affected by lapse of time, the difference between its value at decedent's death and its value as of the later date must be analyzed to determine the portion of such difference attributable to other cause or causes, and that portion only is to be applied in adjusting the value as of the date of the decedent's death. If, for example, the decedent owned a patent which on the date of his death had an unexpired term of ten years and a value of $100,000, and if the patent was sold six months after the decedent's death, at which time, because of the lapse of time and other causes, only $65,000 was realized therefor, the value would be determined as follows:

Value of patent on date of decedent's death		$100,000
Difference between value on date of death and date of sale ($100,000 minus $65,000)	$ 35,000	
Portion of such difference due to the six months elapsing between date of death and date of sale (one-half of 10% of $100,000)	5,000	
Portion of difference due to causes other than lapse of time		30,000
Adjusted value of patent		70,000

Or, to give another example, it may be supposed that the decedent was entitled to receive property which, at the time of his own death, was worth $50,000, upon the death of another person who was entitled to the income therefrom for life and who was 31 years old at the time of the decedent's death. The value at decedent's death of his remainder interest would, as explained in article *10(i)* of these regulations, be $15,631, and if, due to economic conditions, the property declined in value and became worth $40,000 one year after the date of decedent's death, the value of the remainder interest would be determinable in the following manner:

Value of remainder interest at decedent's death (50,000 times factor (0.31262) shown opposite age 31 in column 3 of Table A, article *10*)	$15,631.00
Value of remainder interest one year after decedent's death (40,000 times factor (0.31929) shown in Table A, for age 32)	12,771.60
Net difference due in part to decline in value of the property and in part to increase in the value of the remainder interest due to lapse of time	2,859.40
Elimination of the increase due to lapse of time (50,000 times the difference between the factor for age 32 and the factor for age 31, or 0.00667)	33.50
Portion of the difference in value due to the decline of the property	3,192.90
Value of remainder interest at decedent's death	15,631.00
Less portion of difference not due to lapse of time	3,192.90
Adjusted value of remainder interest	12,438.10

(The amount of the adjustment may be computed more readily by multiplying the decline in the value of the property ($10,000) by the factor (0.31929) applicable to the later date.)

Deductions authorized under section 303 are limited to the extent that allowance thereof is not, in effect, given in the valuing of the gross estate. Property passing by decedent's will, or passing by a transfer made by the decedent in his lifetime (if the transfer was such as to require the property transferred to be included in the gross estate) to or for any such public, charitable, or religious uses as are described in section 303(a)(3) or in section 303(b)(3), is deductible at its value as of the date of the decedent's death, subject, however, to adjustment for any difference in value one year after such death, or at the date of the sale or exchange in the case of property sold or exchanged during such one-year period. But no such adjustment may take into account any difference in value due to lapse of time or to the occurrence or non-occurrence of a contingency.

The election is available to the executor only at the time the return is filed, and only if the return is filed within fifteen months from the decedent's death, or within the period of an extension of time for filing granted under the provisions of article 68 or 69 of these regulations. The election applies to all the property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of such property. The election, if exercised, cannot be rescinded.

In every case where the election is exercised, the return, Form 706, must set forth (1) an itemized description of all property included in the gross estate on the date of the decedent's death, together with the value of each item as of that date, (2) an itemized disclosure of all distributions, sales, exchanges, and other dispositions of any of the property during the one-year period after the decedent's death, together with the dates thereof, and (3) the value of each item of property determined in accordance with the provisions of subdivision (j). The amount of any income accrued and unpaid at the date of the decedent's death on each item of principal, the amount of any income collected or otherwise realized thereon after the decedent's death and prior to the date as of which the item of principal is to be valued, and the amount of any income accrued and unpaid thereon at such subsequent valuation date, shall be separately shown. All the information indicated by Form 706 must be supplied. Statements as to distributions, sales, exchanges, and other dispositions of the property within the one-year period must be supported by evidence. If the

court makes an order or decree of distribution during that period, a certified copy thereof must be submitted as part of the evidence. The Commissioner may require the submission of such additional evidence as is deemed necessary."

The statement of the House managers of the conference committee on the bill, H. R. 8974, which was printed with the conference committee report contains the following specimen computation illustrating the workings of the optional valuation provision (H. Rep't. No. 1885, 74th Cong., 1st Sess., pp. 10-11):

> * * * If the executor exercises the election given him by the conference agreement, all the property included in the estate on the date of death is to be valued as of the date 1 year after the decedent's death, except that the value (at the time of distribution, sale, exchange, or other disposition) of property distributed, sold, exchanged, or otherwise disposed of, is taken in lieu of its value as of 1 year after death. * * * The operation of this new provision giving the executor an election may be shown by the following example:
>
> A decedent dies owning real estate of the value of $100,000, corporate stock of the value of $60,000, bonds of the value of $20,000, foreign government bonds maturing 9 months after date of death of a face value of $10,000, but of a value of $9,550, and cash amounting to $5,000. These values are as of the date of death. The gross estate at date of death amounted, therefore, to $194,550. The decedent had debts of $15,000 and the administration expenses were $25,000, which debts and expenses were promptly paid by the executor. The value of the net estate as of date of death was, therefore (after taking off the specific exemption), $114,550. Six months after the decedent's death the executor distributed the bonds to a legatee under the will, at which time they were worth $18,000, and he sold all the corporate stock owned by the decedent for a fair market value of $50,000 in order to raise cash to pay the debts and expenses. The foreign bonds were paid in full at maturity. During the first year after the decedent's death the value of his real estate appreciated $5,000.

The executor elects to take advantage of the provision of the bill. The value will be arrived at in this way:

Assets:	Value
Real estate (as of 1 year after death)	$105,000
Corporate stock (as of date of sale)	50,000
Bonds (as of date of distribution)	18,000
Foreign bonds (as of date of disposition, i. e., maturity)	10,000
Cash	5,000
	$188,000
Deduct:	
Debts	$15,000
Administration expenses	25,000
Specific exemption	40,000
	$108,000